

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
JOHN WILEY & SONS, INC., : 13-CV-816 (WHP)
:
Plaintiff, : February 13, 2014
:
v. : 500 Pearl Street
:
BOOK DOG BOOKS, LLC., et al., : New York, New York
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC DISCOVERY DISPUTES
BEFORE THE HONORABLE GABRIEL W. GORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Hello. This is Judge Gorenstein. Who's
2 on the line, please?

3 MR. OPPENHEIM: Your Honor, this is Matt Oppenheim
4 on behalf of the plaintiff publishers and I also have on the
5 line with me my colleague Julie Chen.

6 MS. MILLER: Hello, Your Honor. Tiffany Miller
7 calling from Columbus, Ohio and I'm calling on behalf of the
8 defendants.

9 THE COURT: Okay. We're here based on letters --
10 well, first there's a set which started with a letter February
11 4th. There's a responsive letter February 6th and there's a
12 letter February 5th and a responsive letter February 10th and
13 then a letter February 10th, a responsive letter February 12th.

14 I assume you know, Mr. Oppenheim, that I got an
15 unredacted version of the documents that you sent me. My
16 clerk had asked Ms. Miller to send back.

17 MR. OPPENHEIM: I was not aware of that, Your Honor,
18 but that's fine.

19 THE COURT: Okay. I'm sorry. I thought -- I would
20 have asked Ms. Miller to tell you. It was an oversight.

21 MS. MILLER: I'm sorry. That just happened literally
22 within the last 40 minutes I would say.

23 MR. OPPENHEIM: In fact, Your Honor, if we were there
24 in person I would hand up additionally -- additional redacted
25 documents that we've seen recently in our document review that

1 are -- the redactions are even more kind of curious. So I'm
2 not sure by looking at a few of them we can resolve this but
3 I'd be interested in understanding Your Honor's view.

4 THE COURT: The other thing that happened was Ms.
5 Miller sent me three documents she thought she might refer to
6 during the hearing. I assume you got those.

7 MR. OPPENHEIM: I didn't know she had sent them to
8 you but she did send me a number of things.

9 THE COURT: It was marked A, B and C. I haven't
10 looked at them but I just want to make sure you have them in
11 case I'm asked to look at them. Do you have A, B and C?

12 MS. MILLER: Yes --

13 THE COURT: I'm asking Mr. Oppenheim.

14 MR. OPPENHEIM: I do.

15 THE COURT: Okay.

16 MR. OPPENHEIM: Yes, I do. I received them.

17 THE COURT: Let's start with I guess the first letter
18 which is the one dated February 4th that contains the
19 plaintiff's requests and my plan was just to go through the
20 issues as raised.

21 The first one is the spreadsheets. My only question
22 to Ms. Miller is is there -- there was a reference to a burden
23 in providing them in Excel format. So I was wondering what
24 you meant by that.

25 MS. MILLER: Well, the documents that have been

1 specifically referenced were not actually created in an Excel
2 format but these are lists that were literally typed up
3 because the court told us to and if we're talking about the
4 sales and forces lists right now these are two of the items
5 that I emailed to you today, the B and C items so you can see
6 what they looked like. These are two of the items that have
7 been -- we've been I think arguing about wanting an Excel
8 spreadsheet.

9 Your Honor told us to supply a list of sources of
10 books and Your Honor told us to supply a list of sales of
11 books and so we did that. If you look at B and C you can see
12 exactly what we produced.

13 THE COURT: Let me focus you on the question. What
14 format did you produce them -- not produce them. Create them
15 in.

16 MS. MILLER: PDF.

17 THE COURT: I don't think you would have created them
18 in PDF. I don't think that's possible.

19 MS. MILLER: My client typed them up and sent them to
20 me in PDF. They may have been typed up in Word or in Excel.
21 I'm not one hundred percent sure.

22 THE COURT: Okay.

23 MS. MILLER: These are just columns and --

24 THE COURT: Well, I think you need to find out the
25 answer to that question and whatever format that they produced

1 it in you should produce to the plaintiff so that he can work
2 with the data if that's what he wants to do. It sounds like
3 there would be absolutely no burden in that.

4 MS. MILLER: Well, Your Honor, I have a concern. As
5 you can see from the columns of data if the IC numbers and the
6 dates and the numbers get separated and mixed up which is
7 completely possible in Excel and a new document is created,
8 how are we going to deal with that situation?

9 THE COURT: I'm totally lost. You have a document
10 that you've created, Ms. Miller --

11 MS. MILLER: I don't know --

12 THE COURT: -- that's marked. There's pages on it.

13 MS. MILLER: Yes.

14 THE COURT: So that's the end of that.

15 MS. MILLER: Right.

16 THE COURT: You don't need to worry. You have your
17 document. I'm sure you'll recognize it. If someone tried to
18 present a fraudulent document I think you'd know right away
19 and I don't think you should be assuming that plaintiffs would
20 present a fraudulent document anyway.

21 MS. MILLER: All right. So if they reformat the
22 information and try to produce it or present it in a different
23 fashion it would not be evidentiary quality I guess is what
24 you're saying.

25 THE COURT: No, it is not. I'm saying it wouldn't be

1 your document.

2 Do you understand my ruling?

3 MS. MILLER: Yes.

4 THE COURT: Let's go on to the next one. Redaction.

5 This is not the first time an issue like this has come up
6 before me. My -- the presumption here, and it's actually a
7 presumption I think in case law as well is that there should
8 not be page by page -- redactions within a page for non
9 responsiveness as opposed to privilege. So I'm going to have
10 to put the burden on you, Ms. Miller, to explain why this
11 should be happening here with respect to all the documents
12 that you did it in. If there's a way for you to group them
13 that would be helpful.

14 Maybe to start you off, I didn't have a lot of time
15 but I did look at your redactions to bank statements and --
16 let's see if I can find it.

17 MS. MILLER: Yes.

18 THE COURT: The Chase bank statement, August 2008,
19 August 29, 2008. Do you see what I'm talking about?

20 MS. MILLER: Yes.

21 THE COURT: And you have deposits and additions and
22 checks paid and then there's a section that's redacted in its
23 entirety and you even redacted the title of that section which
24 I don't know why that would be a secret but if you want to
25 tell me now that it's a secret we'll -- I'll try to figure out

1 how to do this phone call because we are being recorded and
2 anyone can order a transcript at any time. So I'm talking
3 about the Page 7 of 10 and onward. Is the fact that what you
4 redacted you feel that is secret?

5 MS. MILLER: Yes. I will explain what exactly we did
6 here. First of all, these redactions were done in -- with the
7 assistance of folks, financial accounting type folks that
8 worked for my client to --

9 THE COURT: Before you get to that. Is literally the
10 category of what this is you feel secret? I mean I'm ready to
11 say what it is right now. It's written in big letters in the
12 middle of the page.

13 MS. MILLER: The heading I personally don't feel is
14 secret. I think the fact that that got subsumed in
15 [inaudible] may just be a secretarial error.

16 THE COURT: Okay. So we'll say right now it's the
17 section on electronic withdrawals and it has --

18 MS. MILLER: Yes.

19 THE COURT: That's the entire redaction. I'm doing
20 this for Mr. Oppenheim's benefit. It's a section that goes
21 from the beginning of August to the end of August and it has
22 all the electronic withdrawals by date, description and amount
23 and then it has a total amount at the end. So go ahead,
24 explain to me what that --

25 MS. MILLER: Yes. So I agree with Your Honor. I

1 don't think the header, electronic withdrawals, is
2 confidential. I think that when this redaction was done it
3 was just -- that was just subsumed within the section.

4 But, in any event, what -- the reason these
5 transactions were redacted is because Your Honor asked us to
6 produce information reflecting all monies, all transactions
7 reflecting monies or benefits to and from Mr. Smyers or on his
8 behalf in some fashion. All of these electronic withdrawals
9 have to do with nothing of that kind. Nothing to do on or
10 behalf of Mr. Smyers or anything to do with that.

11 And if you want me to go into the greater issue of
12 why we care that the other side sees this or not I can go into
13 that now but that's the starting point is none of this
14 information contains that type of stuff.

15 THE COURT: I'm just wondering why all of the
16 deposits and additions and all of the check page would have
17 been left in but not the electronic withdrawals.

18 MS. MILLER: Because the electronic withdrawals, the
19 detail of it actually reveals the names of entities of
20 vendors, customers, suppliers of people that we do business
21 with. It reveals details of what we do in the course of
22 business whereas if you look earlier in that same page, check
23 paid, you cannot learn anything about checks paid as to who or
24 why or what are being paid those amounts.

25 THE COURT: Okay. I mean you left the dates and the

1 amounts of payment and yet you redacted them from the
2 electronic withdrawals. It just seems inconsistent.

3 MS. MILLER: I don't understand.

4 THE COURT: For the checks --

5 MS. MILLER: What's the question?

6 THE COURT: -- you left the date of the check and
7 the amount of the check.

8 MS. MILLER: Yes.

9 THE COURT: For the electronic withdrawals you
10 redacted the date of the withdrawal and the amount of th
11 withdrawal. It seems inconsistent.

12 MS. MILLER: Yes. As you can see from the electronic
13 withdrawal section it contains detail that explains to you
14 more about who -- what the money is being used for.

15 THE COURT: I understand that. Do you understand my
16 point? Do you understand why I think it's inconsistent?

17 MS. MILLER: No, I don't understand.

18 THE COURT: For the checks you left the date of each
19 check and the amount of each check. For the electronic
20 withdrawal you redacted the date and you redacted the amount.

21 MS. MILLER: Oh, you're saying it would be better if
22 I had redacted the detail but left the date and the amount
23 revealed?

24 THE COURT: I'm trying to understand whether there's
25 a consistency or not in the redaction. That's all I'm trying

1 to get at right now.

2 MS. MILLER: Well, maybe it would help if I explain.
3 When you're redacting these documents in an electronic form
4 using for example an Adobe type product, and there are many
5 other products you can use, generally you redact one complete
6 line at a time. I guess our feeling was if we were redacting
7 the detail that it really didn't make a difference either/or
8 whether we also redacted the date and the dollar amount as
9 well. I would be happy to -- I think -- I see no problem with
10 doing this again and redacting the transaction detail and
11 leaving them with the dollar and the date but I doubt that
12 that will address the concern that plaintiff's counsel is
13 expressing.

14 THE COURT: I wasn't asking for the solution. I was
15 trying to understand why there is an inconsistency and you've
16 just explained it. So that answers my question as to why you
17 did it that way.

18 Let me just -- I'm going to give -- I mean maybe
19 since it was Mr. Oppenheim who pointed out some of these
20 document redactions to give it a chance for me to go through
21 and discuss with you I guess what's been redacted. Mr.
22 Oppenheim, do you have some other way you want to proceed on
23 this?

24 MR. OPPENHEIM: I don't think we can deal with this
25 problem, Your Honor, by looking at each and every page that

1 was redacted. We sent you a couple of examples and if I were
2 there sitting in person which I tried but the snow beat me out
3 of there, I would hand up to you a document that we saw the
4 other day that was just recently produced where it's emails
5 back and forth and we get the substance of all the emails but
6 the subject line, you know the re: line, that's redacted.

7 Their one scenario can be underlying email, the
8 substance of the emails be relevant and it clearly is and the
9 re: line isn't or text messages back and forth between
10 individuals here regarding the purchase of the books alleged
11 in the fraud claim and every other line of the conversation is
12 redacted out. You can't possibly follow the conversation in
13 the text messages.

14 So I'm not sure how we deal with this by looking at
15 one or two examples and say well, it's okay here and it's not
16 okay there unless you want the defendants to submit to you in
17 camera every time they did a redaction which would be an
18 enormous amount of work on the court's -- I don't think that
19 redactions like this when for instance I'm looking at a
20 conversation and text messages literally right on point with
21 respect to the issues here in this case that I should have to
22 try to decipher whether the one word redacted out of a
23 sentence is relevant. I mean literally you get an entire
24 sentence and they take out one word. So this is a --

25 THE COURT: I think you actually sent an example in

1 your last page with a conversation where there are parts
2 redacted. Am I right?

3 MR. OPPENHEIM: I have to pull apart which exhibits
4 we sent and which ones I had in my folder.

5 MS. MILLER: And this is a good example. I'd be
6 happy to explain. This is very --

7 THE COURT: Hold on. Let Mr. Oppenheim get in front
8 of him.

9 MR. OPPENHEIM: So that would be --

10 THE COURT: I think Cahill 1218 in your version.

11 MR. OPPENHEIM: I have Cahill 1405 in front of me. I
12 have Cahill 6 in front of me. Cahill 505. You said it was
13 14. I'm sorry.

14 THE COURT: 14 -- 1218. It's literally the very last
15 page of what you sent me.

16 MR. OPPENHEIM: Yes, okay. I have it now. Yes.

17 THE COURT: That's fine. And I have yours and I have
18 the unredacted version and -- let me tell Ms. Miller my
19 principle and you can tell me why it shouldn't be applied.
20 But if you have conversations like this it's -- unless there's
21 a legal privilege it's just too confusing to redact portions
22 of the conversation that you think go off on another topic or
23 in this case some phrases and words that go off on another
24 topic. I just think it's too hard to work with.

25 MS. MILLER: May I respond?

1 THE COURT: Yes.

2 MS. MILLER: Well, I know it's difficult to -- I mean
3 certainly I wouldn't think you would know this from reading it
4 but there is a reference to a name here that is in the
5 conversation relating to that name was redacted for a very
6 specific purpose. This is a supplier of books that defendants
7 used and we -- I can go into the deep and dark reasons why it
8 is very [inaudible] that neither counsel nor the clients are
9 revealed the names of suppliers and vendors that we work with.
10 But this is a conversation about another supplier that does
11 not supply any of the titles that have been brought into issue
12 in this case. It's another supplier. It's not a supplier in
13 Thailand. It's not involved in this case whatsoever and it
14 is -- this supplier as well as the names of other suppliers is
15 very highly critical that neither counsel nor their client
16 know the names of them because we have experienced in the past
17 with them using this information against us to our detriment
18 in spite of protective orders and it's not responsive.

19 Your Honor, a protective order is a protective order
20 and that's fine but Rule 26 says we don't have to produce non
21 response and non relevant documents or information and a
22 protective order is not a blank check to get to walk into
23 someone's business and start rifling through all their
24 business information and that's what plaintiffs are after
25 here.

1 MR. OPPENHEIM: Your Honor, can I --

2 THE COURT: Yes, go ahead.

3 MR. OPPENHEIM: -- this is Mr. Oppenheim. Can I
4 respond for a moment?

5 THE COURT: Yes. Yes, go ahead.

6 MR. OPPENHEIM: I have no idea what Ms. Miller is
7 referring to when she suggests that the plaintiffs have
8 obtained information in the course of litigation that they
9 have used to the detriment of the defendants. She throws
10 things like that out there and unless she's prepared to put
11 forward evidence and really make that a claim she can't just
12 throw that out there because I'm certainly not aware of it.

13 If there's -- if they're engaged in legitimate
14 business there should be no issue in disclosing this subject
15 to the protective order which is a protective order that they
16 negotiated and they stipulated to. It has two levels of
17 protection. So if it's highly confidential so it shouldn't
18 get to the business people in the company they can take care
19 of that.

20 If it's illegitimate business that they're trying to
21 hide and avoid being subject to claims on then that's a
22 different issue and they have no basis to say well, because
23 we're engaged in other improper and illegal activities we
24 shouldn't have to show it in the context of this litigation.
25 I don't know which it is but either way I just don't see how

1 they can -- how they can take the position they're taking.

2 THE COURT: Okay.

3 MS. MILLER: Your Honor --

4 THE COURT: Go ahead. Go ahead.

5 MS. MILLER: First of all, I'm not contending that
6 we're engaging in illegitimate business. I'm contending we're
7 engaging in business that is none of plaintiff's business that
8 they would love to know and they typically use these lawsuits
9 for the very purpose of finding out the nature of our
10 business. That -- the value of that information is more
11 valuable than any claim they have in this case.

12 Setting that aside, I can give Your Honor a very
13 specific example of how plaintiffs have used this case and
14 used information they have found in this case to the detriment
15 which I would be happy to share with Your Honor if you think
16 it's necessary.

17 THE COURT: No, it's not necessary. This is what
18 we're going to do. We're going to have a third level of
19 confidentiality which is attorney's eyes only. Any
20 conversations where little bits within a page have been
21 redacted are going to be produced in unredacted form to
22 counsel. If there -- that's going to deal with the
23 conversations and text messages and things like that.

24 Is there some other way -- some way we can
25 characterize other redactions that have gone on. That's a

1 question for Mr. Oppenheim.

2 MS. MILLER: Your Honor, can I clarify? Will that --
3 and I'm happy that you brought up that third level because
4 that was going to be a suggestion of mine. Could we please
5 make that clear that that's attorney's eyes only is for
6 counsel of record in this action, not for corporate counsel?

7 THE COURT: That's fine. Counsel of record,
8 information to be used only for purposes of this litigation.

9 Now, what can we do to categorize the other
10 redactions or talk about them, Mr. Oppenheim? Do you have any
11 ideas? To me the principle should be -- the burden is going
12 to be on you, Ms. Miller. The principle should be within a
13 page there just shouldn't be redactions unless there's a
14 reason that you're going to be able to persuade me that even
15 counsel without the corporate client should not be able to
16 look at it.

17 MS. MILLER: Well, Mr. Oppenheim has expressed to me
18 generally that the reason he doesn't like the redactions is
19 because he doesn't trust us that the information we've
20 redacted is not relevant. So if I have absolute assuredness
21 that people within his firm -- attorneys within his firm only
22 are going to be reviewing it simply to confirm that the
23 information is trustworthy of what I said, that's fine.

24 THE COURT: You can produce an unredacted version.

25 MS. MILLER: We've been burned before so we're very

1 weary of this.

2 MR. OPPENHEIM: You know, Your Honor --

3 THE COURT: Mr. Oppenheim --

4 MR. OPPENHEIM: -- [inaudible] allegation.

5 THE COURT: Mr. Oppenheim, listen, Ms. Miller, I'm
6 considering that stricken because I don't want to go back over
7 that. I need to solve this problem. So we're going to have a
8 production without the redactions. We'll have this third
9 level of confidentiality. If for some reason, Mr. Oppenheim,
10 you think there's been an over-redaction and you need to share
11 something with your client that got redacted you'll have to
12 either get an agreement with Ms. Miller to put it to another
13 level or you'll come back to me.

14 MR. OPPENHEIM: Yes, Your Honor.

15 THE COURT: Does that take care of the redaction
16 requests I guess? We can go on to the next thing.

17 MR. OPPENHEIM: Yes, Your Honor.

18 THE COURT: Bank statements and tax returns. Why
19 don't you refresh my memory, Mr. Oppenheim, of what this is?

20 MR. OPPENHEIM: I think there are three issues within
21 this category. The first is that at the last hearing Your
22 Honor ordered the production of the bank statements for the
23 defendant's companies for which he owned 51 percent or more of
24 the companies. After significant back and forth Mr. Mooney
25 asked whether it was adequate for the defendants to simply

1 produce those portions of the bank statements that had
2 relevant transactions and you said no. Well, that's what they
3 did anyway and it's very difficult to piece together what's
4 happened from the bank returns because we don't have all of
5 them and with the redactions we can't possibly begin to
6 understand what the references to checks are is.

7 Your Honor, for purposes of the redaction discussion
8 looked at some of those bank returns. Simply looking at a
9 bank return that says that they wrote a check on the 1st of the
10 month for \$50,000.00 without being able to see who that check
11 was paid to makes things very difficult. It effectively makes
12 the bank statements useless.

13 THE COURT: Well, have we perhaps, Ms. Miller, solved
14 this problem with this ruling about redactions or is this a
15 separate issue? I mean actually I do have the memory that you
16 were supposed to produce the whole thing but I don't have a
17 problem with your doing it attorney's eyes only under the
18 system I just said.

19 MS. MILLER: I think Your Honor is right. I mean
20 that's exactly what I was thinking as he was speaking. I
21 think our understanding of what Mr. Mooney said was that he
22 wanted the chance to produce documentation for each
23 transaction. I didn't think we viewed that as within a bank
24 statement but I guess that's not a here or there -- neither
25 here or there. If we have assurance that if we unredact these

1 and no one will see them except Mr. Oppenheim and Ms. Sutter
2 and Ms. Chen then I think that solves our problem.

3 THE COURT: Okay. Again, if, Mr. Oppenheim, you
4 think there's some other level that needs to be attached to
5 some redaction you'll work that out or come to me.

6 MR. OPPENHEIM: Yes.

7 THE COURT: What's left on the bank statements then?

8 MR. OPPENHEIM: Well, just two quick issues, Your
9 Honor. It wasn't just that there were redactions. There were
10 entire statements that weren't produced because they decided
11 they weren't --

12 THE COURT: They should all be produced for the time
13 period and you can consider an entire state statement to be
14 within the attorney's eyes only designation, Ms. Miller.

15 MS. MILLER: Well, I guess I'm not clear about that.
16 Your Honor wanted us to produce all statements reflecting any
17 kind of transaction to or from Mr. Smyers or on his behalf.
18 So there are instances of entities who just literally have no
19 bank statements and there may have been a few instances where
20 the bank statements had no information of any transaction of
21 that kind. So we may have withheld one or two statements
22 because it literally has no transactions of that kind.

23 THE COURT: Well, for the sake of consistency let's
24 just include those and they'll have the same protection.

25 [Everyone speaking over each other.]

1 MR. OPPENHEIM: No bank statements were produced.

2 THE COURT: Hold on, hold on, hold on. Folks, only
3 one person can talk at a time.

4 MS. MILLER: All right. Sorry.

5 THE COURT: So let's go Mr. Oppenheim and then Ms.
6 Miller.

7 MR. OPPENHEIM: Right. So there are entire companies
8 for which no bank statements were produced and it's not just
9 the issue of payments to and from Mr. Smyers. Having taken
10 the deposition of the chief financial officer yesterday I've
11 now learned that all of the -- there are 20 some companies and
12 they're all funded through different companies and they write
13 checks back and forth to each other. So watching kind of the
14 flow of the money between the companies may also become
15 relevant. We need to make sure we have all the right
16 defendants in the case. So it goes to needing kind of -- get
17 all of the bank statements for all of the companies as I think
18 Your Honor has said.

19 THE COURT: I think that's where we are anyway,
20 right, Ms. Miller?

21 MS. MILLER: No, absolutely not. This is totally
22 completely outside of anything that was ever contemplated
23 here. Now Mr. Oppenheim is wanting to discover financial
24 information of multiple entities who are not named as
25 defendants here just so he can think about whether he wants to

1 sue them for whatever reason and this is -- this is a fishing
2 expedition and this is not acceptable.

3 The CFO at the deposition which occurred yesterday
4 made it very plain which entities Mr. Smyers has ever received
5 money from or who have ever paid monies on his behalf. There
6 are multiple other entities who are holding companies, who are
7 real estate related companies, who are companies that have
8 nothing to do with anything in this case and certainly are not
9 named as defendants who may or may not have bank statements
10 and a lot of them do not because they just do not hold money.

11 But Mr. Oppenheim is trying to delve into every
12 detail of every little entity that Mr. Smyers has any interest
13 in and that's not what this case is about. I mean the court
14 has to cut this off somewhere. The entity that is named in
15 this case is Book Dog Books. If we're going to --

16 THE COURT: Ms. Miller, though -- Ms. Miller --

17 MS. MILLER: -- [inaudible] invest Book Dog Books.

18 THE COURT: Ms. Miller, I think there was no doubt
19 that entities in which he had a controlling interest in
20 were -- regardless of whether they're defendants there was
21 supposed to be some kind of production from them; right?

22 MS. MILLER: And we did that. Even though we contend
23 that it has nothing to do with this case we complied with what
24 you said. We provided any bank statement reflecting any to or
25 from or on behalf of transactions. We provided those bank

1 statements. Mr. Oppenheim is now asking to get into something
2 else and I think this is an appropriate time for us all to
3 reflect back on the question of why is the court allowing this
4 in any event. I mean this financial information is not really
5 relevant to any of the copyright trademark breach of contract
6 claims in this case and I know that at one point a long time
7 ago Mr. Oppenheim argued that he should get to see these
8 things to try to make a case that he should get to pierce the
9 corporate veil but this has gotten -- I mean this is just
10 compounded into something that is just let me see everything
11 that you have that has anything to do with any business, any
12 personal financial information. So let's talk about why this
13 is not relevant.

14 THE COURT: I think my prior -- I'd like to just
15 stick with whatever my prior ruling was. I think the prior
16 ruling was that any entity in which he had the 51 percent or
17 more interest that they were going to get financial records of
18 those companies to the extent that there were any transactions
19 between them or between him and those other companies.

20 MS. MILLER: Well, that's been completed. That's
21 been done except --

22 THE COURT: So, Mr. Oppenheim, you're looking for
23 something beyond that?

24 MR. OPPENHEIM: I don't think that's been done, Your
25 Honor. What --

1 THE COURT: Hold on. First answer my question if you
2 can. Mr. Oppenheim, are you looking for something beyond that
3 or are you saying this hasn't been done? Which is it?

4 MR. OPPENHEIM: Well, that question goes to -- when
5 you asked about bank statements I said I thought there were
6 three issues. So your question now goes to the other two
7 issues but with respect to the bank statement issue what Ms.
8 Miller is saying has been done has not been done because what
9 I understood your ruling to be, and I think it's pretty clear
10 from the record of the last hearing was for any company in
11 which Mr. Smyers owns 51 percent or more that they will
12 produce the bank returns from 2008 to 20 --

13 THE COURT: Regardless of whether it has to do with
14 transfers to him or other companies.

15 MR. OPPENHEIM: Right.

16 THE COURT: I actually don't have a memory of it and
17 I'd like to just --

18 MR. OPPENHEIM: Well, that --

19 THE COURT: Show me the transcript. Whatever I ruled
20 I feel we're going to stick with it.

21 MR. OPPENHEIM: And that was what you ruled. What
22 they've done is they've said --

23 THE COURT: Hold on. Stop. Stop. Hold on. If you
24 can just show it to me. I have it in front of me. Tell me
25 the page.

1 MR. OPPENHEIM: Julie, you're on the line. Do you
2 have the cite to where that is in the transcript?

3 MS. CHEN: We cited it in our letter. Is it Pages 26
4 to 27?

5 THE COURT: Hold on.

6 [Pause in proceedings.]

7 MR. OPPENHEIM: Yes, on --

8 THE COURT: Hold on. Hold on. Hold on. Hold on.

9 MR. OPPENHEIM: Okay.

10 [Pause in proceedings.]

11 THE COURT: Yes, that is the ruling I made. I said
12 he should look at the big picture and you should get
13 everything. So, Ms. Miller, we're going to continue with that
14 ruling.

15 MS. MILLER: I don't understand.

16 THE COURT: I said that rather than have you make a
17 judgment about which were entities that -- that only the
18 entities that he owned were -- let me back up.

19 Rather than have you make a judgment within each of
20 the bank statements that you should only produce those that
21 show transaction to the entities I said just produce all of
22 the bank statements.

23 MS. MILLER: So Your Honor is telling us to produce
24 bank statements that include no responsive information at all?

25 THE COURT: Well, you're producing -- yes. While it

1 may not be responsive in the sense that it's not these
2 specific transactions but they made the case to me that they
3 had to understand the financial operations of these very
4 complex companies and that in order to understand that they
5 really had to see where the money was going.

6 MS. MILLER: Your Honor, I guess what I'm asking is
7 under what circumstances can I now ask you to revisit the
8 issue of whether that's appropriate.

9 THE COURT: I think we're beyond that at this point.
10 Reconsideration is done.

11 MS. MILLER: I mean the plaintiffs are going to be
12 able to dig into financial information even though it has
13 nothing whatsoever to do with their claims for the rest of
14 this case?

15 THE COURT: Ms. Miller --

16 MS. MILLER: I think we have --

17 THE COURT: -- the tone of the question is -- Ms.
18 Miller, the tone of the question is bordering now on the
19 inappropriate. So we need to get back on track here. I made
20 a ruling on January 23rd. There was no motion to reconsider
21 it. It's clear to my mind. I said at the time I didn't think
22 there was a burden to it. I don't even hear a burden now.
23 There's a concern that it could be used improperly. I'm
24 willing to say that we'll use this third level of production
25 to get it done but that's it. We're not going to revisit it.

1 What's next, Mr. Oppenheim?

2 MR. OPPENHEIM: Okay, Your Honor. With respect to
3 the bank statements issue there are two other issues. One is
4 the 50 percent ownership versus 51 percent. Your Honor did
5 rule 51 percent. What we have subsequently learned is that
6 Book Dog Books used to purchase all of its own books. So the
7 counterfeit books and the fraud books were purchased through
8 Book Dog Books. Until roughly --

9 THE COURT: Mr. Oppenheim, this point was made in a
10 footnote and if there is a back story as to why this wasn't
11 raised earlier and why it's being raised now I need to have
12 that and I don't want to do it orally now on the phone. So if
13 you want to make a new application you can make the new
14 application.

15 MR. OPPENHEIM: We can do that, Your Honor. It came
16 up in the deposition yesterday. Yes, we included it in a
17 footnote. We now fully understand it from the deposition. If
18 you want we'll submit a letter on it, Your Honor. That's
19 fine.

20 THE COURT: That's fine.

21 MR. OPPENHEIM: The third issue with respect to bank
22 statements is the issue of personal bank statements. Your
23 Honor didn't address it specifically one way or the other
24 during the last hearing. The plaintiffs presumed that the
25 bank statements would include that of the defendant Phil

1 Smyers and the defendants of course presumed that it didn't.
2 So we really are trying to understand the monies earned by Mr.
3 Smyers as the owner and operator of these companies and trying
4 to piece it together exclusively from the documents we have so
5 far has been very difficult.

6 So we've asked for and the defendants have refused
7 to provide the tax returns for Mr. Smyers and so we now raise
8 this issue with Your Honor.

9 THE COURT: Ms. Miller.

10 MS. MILLER: They're asking for his personal tax
11 returns? We have to date produced every W-2 and every K-1
12 which fully reflects every dollar that Mr. Smyers has received
13 personally from any of these companies. Yesterday at the
14 deposition the CFO of the company testified in very explicit
15 terms and confirmed that with those documents and the
16 company's tax returns which Mr. Oppenheim has which includes
17 the line item on the tax return listing distributions for Book
18 Dog Books. They have all of the information showing all
19 monies he has received personally from Book Dog Books and the
20 other companies.

21 This is a personal intrusion. Your Honor's previous
22 order in no way included personal information, personal tax
23 returns. There's no need for it and again I reiterate that
24 the claims in this case damages are not measured whatsoever
25 based on income, profit or anything of the kind. Trademark

1 and copyright claims are based on actual damages or statutory
2 damages measured on each instance of profit from each instance
3 of infringement, not based on overall profits or income.

4 MR. OPPENHEIM: Respectfully, Your Honor, with
5 respect to that last point, that's not accurate. First off,
6 in terms of statutory damages, one of the factors that a jury
7 gets to consider in a statutory damages case is deterrence and
8 in order to measure deterrence you need to understand the
9 earnings of the defendant in order to deter them from future
10 infringing conduct. In a case like this where it's the second
11 lawsuit of infringement that will be a substantial factor for
12 the jury to consider.

13 Also, with respect to the fraud claim, obviously
14 punitive damages, the issue of overall profits and worth is a
15 factor.

16 THE COURT: I think that --

17 MS. MILLER: May I respond, Your Honor?

18 THE COURT: That's not necessary. I think, Mr.
19 Oppenheim, this is getting beyond what I think I'm prepared to
20 order. You're getting all the information about how these
21 companies made pay outs to him or the related companies and
22 ultimately to him and to now explore his personal bank
23 statements or tax returns I think that's beyond what I'm
24 prepared to permit right now. So that application is denied.

25 What's next?

1 MR. OPPENHEIM: The next issue, Your Honor, is the
2 inspection of the non plaintiff books which we discussed at
3 the last hearing. That inspection is actually occurring
4 today. I have -- we have people flown in to Ohio who are
5 engaging in that inspection.

6 At the time that we discussed this at the hearing
7 last -- I guess it was in December the issue was raised of
8 concerns about the information of the non plaintiff books
9 going outside of the parties to the case. So Your Honor
10 ordered that there be a limitation that they --

11 THE COURT: Is this issue not resolved? Because
12 defendants --

13 MR. OPPENHEIM: -- [inaudible].

14 THE COURT: Mr. Oppenheim, this issue was not
15 resolved?

16 MR. OPPENHEIM: No. In fact, we have experts in
17 their conference room right now who are not being allowed to
18 see -- experts with the companies who are plaintiffs who want
19 to look at these other books to determine whether or not
20 there's a massive counterfeiting going on more generally which
21 is one of the claims in the case and they're not being allowed
22 into that conference room. They've been -- everybody has been
23 told they can't share the information outside of the --
24 counsel in the case. Yet all they're doing is saying well,
25 the lawyer can go in and the person who's a paralegal at one

1 of the companies who isn't an expert in reviewing whether a
2 book is a counterfeit can go in but the people who are the
3 experts aren't allowed to see them.

4 THE COURT: Ms. Miller.

5 MS. MILLER: Yes. We've got the books -- well, first
6 of all, all the -- a great majority of the books for the
7 inspection everybody from Mr. Oppenheim's side of things that
8 showed up they're all allowed to look at them and rifle
9 through them, do whatever they want.

10 There's a small subset of books which you may recall
11 we talked about at the last hearing. These are books that
12 were quarantined with the names of other publishers other than
13 the plaintiffs in this case that were quarantined on -- as
14 being potentially suspicious, questionable, not guaranteed
15 counterfeit that's questionable and Mr. Oppenheim demanded
16 that his folks be allowed to see stuff from these other
17 publishers too even though they're not involved in this case.

18 Your Honor said that okay, we'll let you see these -
19 - the books relating to these other publishers but only the
20 attorneys under the highly confidential of the protective
21 order and that's what we're doing. The folks at the
22 inspection today we have allowed. There's one person there
23 who's a member of Mr. Oppenheim's firm who's certainly been
24 allowed to see the books and one of --

25 THE COURT: Who is it you're not -- who is it you're

1 not letting see the books?

2 MS. MILLER: The people who have not been designated
3 under the highly confidential designation, the highly
4 confidential stuff.

5 THE COURT: Yes.

6 MS. MILLER: There's one other person there who's
7 been designated for that. So that person has been allowed to
8 see them.

9 THE COURT: Mr. Oppenheim.

10 MR. OPPENHEIM: Your Honor, if you reviewed your
11 transcript from that hearing nowhere in that transcript did
12 you say that it would be subject to the highly confidential
13 part of the protective order. In fact --

14 THE COURT: What is -- just so I understand. Who is
15 it you want in that you can't get in under that designation?

16 MR. OPPENHEIM: So for both Pearson and Cengage we
17 have onsite, for lack of a better term, production experts.
18 These are the people who know what a book should look like if
19 it's made legitimately. These are the people who will testify
20 at trial about the fact that the books are counterfeit,
21 that --

22 THE COURT: Including ones that aren't the
23 plaintiffs?

24 MR. OPPENHEIM: And they would be the ones who would
25 be able to say I also examined, assuming this is the case,

1 other books that the defendants had purchased that came from
2 either the same sources or other sources. We don't know yet.
3 That were counterfeit.

4 But my paralegal isn't -- or my lawyer and company's
5 paralegal aren't going to testify. So letting them see the
6 books is of no value. So these people are within the company.
7 They're subject to the protective order, not the highly
8 confidential but the confidential portion of the protective
9 order and that fulfills what Your Honor said at the last
10 hearing which is it couldn't go outside of the company.

11 THE COURT: Okay.

12 MS. MILLER: Your Honor --

13 THE COURT: Yes, go ahead. I mean these are not
14 books of the plaintiffs.

15 MS. MILLER: So they have nothing to do with the case
16 in any event.

17 THE COURT: But we're past that.

18 MS. MILLER: This is a copyright case.

19 THE COURT: We're past that. So the inspection has
20 been ordered. It's hard to see how it's of any value unless
21 there's someone with some expertise. Now, if we need to put
22 restrictions on them as to what they can do with this
23 information we can talk about that. I gather there's already
24 some restriction under the lower level of confidentiality. I
25 assume they can only use it for this litigation. Is that

1 right, Mr. Oppenheim? I don't know.

2 MR. OPPENHEIM: Yes. That's correct, Your Honor.

3 And I understand -- I just received an email from my lawyer
4 who's there who says not only are they not letting him in,
5 apparently they're not allowing my lawyer who's there to take
6 notes as to what the books are or to take pictures of the
7 copyright pages so we have information about it. This is --
8 with all due respect, it should not be this difficult.

9 THE COURT: Well --

10 MS. MILLER: These are books from other publishers.
11 You can't make anything in this case out of that. So why are
12 we even talking about it?

13 THE COURT: Well, I made the ruling. I felt it could
14 be relevant to intent. So we have to have a meaningful
15 inspection and a meaningful inspection requires people who
16 understands what these books look like and requires them at a
17 minimum to be able to take notes. I don't frankly see the
18 problem with photographs as long as everything that's taken is
19 shared with the other so they know it's exactly what's there
20 and that it's kept confidential in the same way that other
21 items are being kept confidential. So that's the ruling with
22 respect to that.

23 MS. MILLER: Okay. Well, in light of that, Your
24 Honor, if you could right now tell me who -- there's a group
25 of people at my office in Columbus right now who want to look

1 at these books. Can we get a ruling on -- I've been informed
2 that there's one person, a Richard or a Dick or something --
3 somebody like that who may be so called expert on other
4 publisher's books, can we get a ruling that he may go look at
5 the books and takes notes and that will be the limit of it?

6 THE COURT: Who is you don't want to -- I don't know
7 who's there. Frankly I'm surprised that none of this was
8 arranged in advance and discussed in advance but I guess we --

9 MS. MILLER: It was and I -- the court previously
10 ruled that this would be subject to highly confidential and so
11 I set this up highly confidential --

12 MR. OPPENHEIM: That is not --

13 THE COURT: Hold on. Hold on. Folks. Folks. Don't
14 talk to each other and don't interrupt each other.

15 I'm prepared to try to make people's lives easier by
16 making some rulings but I think the two of you need now -- now
17 that you know what my ruling is you two need to figure
18 something out after we hang up and then if you don't work it
19 out call me back. I'll be here until at least six or 6:30.
20 But I don't want to -- I don't know who's there.

21 MS. MILLER: But, Your Honor -- it's a travel issue.
22 I mean these people are all here from out of town. So if
23 they're going to do it they should do it now.

24 THE COURT: Okay. I agree. I'm saying let them do
25 it and that doesn't seem to be sufficient. So the details I

1 was thinking you could work out. If you're not capable of
2 that tell me what it is you want me to order.

3 MS. MILLER: Well, I -- I guess I --

4 THE COURT: Go ahead, Ms. Miller.

5 MR. OPPENHEIM: There are three people there.

6 MS. MILLER: Go ahead. Go ahead.

7 THE COURT: Go ahead, Mr. Oppenheim.

8 MR. OPPENHEIM: There are three people there from the
9 plaintiffs who are not being allowed in. Two from Pearson and
10 one from Cengage. All three of them are production people.
11 We would like them to be able to review the non plaintiff
12 books, to take notes, if necessary take pictures. They will
13 do subject to the protective order. We will keep the
14 information confidential and to the extent that the defendants
15 want copies of the pictures that they take of the books we
16 will of course produce those.

17 THE COURT: What more do you need, Ms. Miller?

18 MS. MILLER: So I will allow all of these people to
19 come in and see the books if all of their information will
20 remain highly confidential.

21 THE COURT: What's the difference between -- what
22 is --

23 MS. MILLER: Confidential allows --

24 MR. OPPENHEIM: The protective order doesn't allow
25 them -- the protective order only allows the in house counsel

1 and the folks in charge of anti piracy to be subject to the
2 highly confidential designation. So I'm not sure that would
3 be contrary to the protective order as I recall it. I don't
4 have it right in front of me but that's what I recall we
5 negotiated.

6 So I think it should be subject to the confidential
7 restriction. That means it won't leave Pearson or Cengage.

8 THE COURT: I don't know the differences. Ms.
9 Miller, what is the difference? What is the difference
10 between my now saying it's highly confidential versus
11 confidential? Tell me what that means. I don't even know.

12 MS. MILLER: I mean confidential basically allows
13 everyone on both sides, the parties, anybody to see
14 everything. Basically the only stipulation is a promise to
15 not use -- to not share it with people not involved in the
16 litigation and not use it outside the litigation.

17 Highly confidential is [inaudible] restricted to a
18 subset of people for the parties that have decision making
19 power on certain topics. In effect, our highly confidential
20 status has become ineffective because plaintiffs have taken
21 the position that pretty much anyone who makes any decision
22 relating to this litigation counterfeiting activities don't
23 have decision making power on pricing and selection of
24 customers.

25 So they've already designated about seven or eight

1 people within the company outside of counsel who can see all
2 of our highly confidential documents whereas --

3 THE COURT: So the difference is -- I'm just trying
4 to understand the difference, Ms. Miller. I'm just trying to
5 understand the difference. So the difference to you is who --

6 MS. MILLER: Yes. So that's --

7 THE COURT: Hold on. Ms. Miller, Ms. Miller --

8 MS. MILLER: -- difference is everybody in the
9 company versus --

10 THE COURT: Ms. Miller, Ms. Miller. Ms. Miller, if
11 I'm talking you've got to stop because we can't make a
12 transcript if we're both talking.

13 MS. MILLER: I'm sorry. I'm breaking in and out a
14 little bit.

15 THE COURT: All right. It seems to me the difference
16 is between who these people can share the information they
17 learn in their notes and the photographs with. Is that what
18 it is?

19 MS. MILLER: The limits of who can see it in the
20 first instance and who they can share it with, yes.

21 THE COURT: Okay. Since there seems to be an
22 emergency let's just say for the moment that they will share
23 it only with the group in the highly confidential category.

24 And, Mr. Oppenheim, if you need them to be able to
25 go outside that I will be -- revisit this de novo. I'm making

1 this ruling only so that we don't have this argument right now
2 while there are people there. Okay?

3 MR. OPPENHEIM: Very well, Your Honor.

4 MS. MILLER: So only highly confidential people?

5 THE COURT: For right now. That's just --

6 MS. MILLER: For right now.

7 THE COURT: That's just for -- until Mr. Oppenheim --
8 if he comes back to me I will revisit the question de novo.

9 MS. MILLER: Your Honor, you think we should allow
10 them to take notes?

11 THE COURT: I said notes and photographs as long as
12 the photographs are shared with you. Again, all that material
13 treated in the same way, highly confidential for now.

14 MS. MILLER: Will the notes be shared with me?

15 THE COURT: No, that's work product. That's not
16 necessary.

17 MS. MILLER: But the notes will be highly
18 confidential.

19 THE COURT: Within the plaintiff's side for now, yes.

20 MS. MILLER: Okay. Well, I'll -- I just want to know
21 if I can send a message to my people right now to let that
22 happen.

23 THE COURT: Okay. I don't want to interfere with the
24 progress of this.

25 MR. OPPENHEIM: I think, Your Honor, we've -- unless

1 I'm told otherwise by Ms. Chen on the phone I think we've
2 completed --

3 THE COURT: We've got through your letter.

4 MR. OPPENHEIM: -- completed the February 4th letter,
5 yes.

6 THE COURT: So now we get to go to defendant's
7 letter. Ms. Miller, are you with us?

8 MS. MILLER: Yes, I'm here.

9 THE COURT: Okay. So I actually was very thrown off,
10 Ms. Miller, by your letter because I was trying to figure out
11 what discovery requests you made that is in your view not
12 being responded to.

13 MS. MILLER: Yes, Your Honor. Well, we've made
14 several discovery requests worded in different ways that were
15 basically saying telling us what you have, and I'm
16 paraphrasing. Tell us what you have to back up your claim of
17 copyright infringement. To prove copyright infringement you
18 have to show an instance of -- well, in this case an instance
19 of a distribution of an infringing work and --

20 THE COURT: Can you answer something for me?

21 MS. MILLER: -- [inaudible] sure what happened.

22 THE COURT: This sounds very much like a contention
23 interrogatory. Would you say that's essentially what we're
24 talking about?

25 MS. MILLER: A contention interrogatory? The way I'm

1 wording it right now?

2 THE COURT: Well, or however it was worded. Maybe
3 it's not. I'm just --

4 MS. MILLER: The way it was worded back then, no.
5 The way it was worded back then was please produce copies of
6 all documents that support your claim that these folks engaged
7 in distribution of infringing copies of your works and your
8 [inaudible]. That should subsume anything that shows that you
9 have --

10 THE COURT: So documents currently in their
11 possession --

12 MS. MILLER: -- [inaudible].

13 THE COURT: Documents currently in their possession
14 that reflect infringement by the defendants.

15 MS. MILLER: Yes.

16 THE COURT: I'm not sure that's being objected to or
17 that's even what I understood the letter to be about. There
18 seems to be something else going on but you tell me, Mr.
19 Oppenheim. Are there other --

20 MS. MILLER: Well, I --

21 THE COURT: Hold on. Hold on. Let me ask Mr.
22 Oppenheim. Are there documents in the possession of the
23 plaintiffs, not ones that they received from the defendants
24 but ones that were in your possession that show infringement
25 by the defendants that have not been produced?

1 MR. OPPENHEIM: Your Honor, we've responded to their
2 document requests and produced the documents that they've
3 requested and I believe that we have produced the documents
4 for the infringement that we're aware of as of right now. To
5 the extent that additional titles are discovered through this
6 inspection we'll have to supplement our discovery responses.

7 The contention aspect of this, which you put your
8 finger on immediately, is exactly what Mr. O'Grady and I
9 discussed several months ago and we had a very civil
10 conversation about how to handle this. What I suggested as a
11 solution and he agreed was we would create this roadmap as has
12 been explained in the letters. The plaintiffs would create a
13 roadmap which would connect the evidence with respect to each
14 copyrighted work and that that was not a substitute for the
15 underlying evidence which was already being produced but
16 rather would connect the dots for them as to how we intended
17 to proceed with respect to each title and what documents we
18 intended to rely on.

19 Frankly, what we were offering was in many respects
20 much more than we're obliged to provide but we thought it made
21 sense as a way to proceed because this roadmap would be
22 something that we would want to use in the case and that they
23 would need to understand the claims. So we offered to do it
24 and we said we would make a witness available who will testify
25 as to the roadmap and answer their questions on it.

1 We had resolved that issue. New counsel apparently
2 is not in line with this. So here we go but to the extent
3 that she sent a letter identifying specific discovery items
4 that we -- she contended we had not produced we responded and
5 we gave her -- and this is Exhibit 1 in -- to our February 10th
6 letter to Your Honor. We responded to her letter. You claim
7 that we didn't produce the following things, here they are and
8 here are the Bates ranges for those documents.

9 So if the defendants have a specific document
10 request that we have not responded to or they think we have
11 not responded to they should ask us about it but simply
12 throwing out there to us well, you haven't proven your claims
13 at this point in the case it's not something I can get my arms
14 around to understand what she -- what the defendants are
15 looking for.

16 THE COURT: All right. Ms. Miller, I actually want
17 to limit it to the way I framed it because to me the issue is
18 is there a discovery request that hasn't been responded to and
19 if so, what is it. You told me it was you want documents in
20 their possession that show your infringement and they say they
21 have given you such documents in their possession. So tell me
22 what it is you think that you're entitled to that I should
23 order.

24 MS. MILLER: Yes. Well, in order to -- in order to
25 have had an infringement claim at all they would necessarily

1 have to have some information about when a distribution of an
2 infringing book occurred. We have not yet received any
3 documentation reflecting the distribu -- proof of my clients
4 distributing an infringing title on any --

5 THE COURT: Okay. So you think that there are --

6 MS. MILLER: I assume --

7 THE COURT: Hold on. Ms. Miller, you think there are
8 documents in their possession that they have not produced to
9 you that show particular dates on which your client infringed;
10 is that what you're saying?

11 MS. MILLER: Yes, because they filed this claim I
12 assume they have evidence to support the claim and we haven't
13 gotten it. So --

14 THE COURT: I don't want to know the basis --

15 MR. OPPENHEIM: -- [inaudible].

16 THE COURT: Ms. Miller, if the answer to this is they
17 couldn't have filed the complaint without having this document
18 I'm not going to accept that as a basis for me to make a
19 discovery ruling. I'm going to make the ruling based upon
20 whether they have documents that they've -- in their
21 possession that they've refused to produce to you.

22 MS. MILLER: That's fine.

23 THE COURT: So is it your contention that they have
24 a document in their possession that show dates of infringement
25 that they've refused to produce to you?

1 MS. MILLER: It's my contention that either they have
2 them and they refused to produce them or they need to tell me
3 they don't have any, one of the two.

4 THE COURT: Okay. Well, I think it's enough for them
5 to say that we've given you documents A through D or all that
6 we have on that topic or 1 through 10 or all we have on that
7 topic. I don't think --

8 MS. MILLER: Right.

9 THE COURT: That's quite enough.

10 MS. MILLER: If there is nothing -- yes, yes.

11 THE COURT: So are there documents in your
12 possession, Mr. Oppenheim? I mean I think the problem, Ms.
13 Miller, is your view of this is you asked them for documents,
14 you didn't get very much, you don't think that they could have
15 put a complaint together based on those documents and you
16 think there's something wrong with that. And that's fine for
17 you to think but that's not what discovery is about. What
18 discovery is about is what's in their possession that they
19 haven't given to you. If they tell me they don't have
20 documents in their possession on a particular category I can't
21 do anything about that from a discovery point of view. I
22 can't order someone to produce something they don't have. So
23 if they don't have it that's the end of it.

24 There was nothing in your letter that suggested that
25 there was some particular document they were refusing to

1 produce to you that was sitting in their possession they were
2 refusing to give to you. So I don't know what I can do for
3 you, Ms. Miller.

4 MS. MILLER: Actually, I appreciate Your Honor's
5 comment. I one hundred percent agree with what you're saying
6 and maybe my letter did not say it explicitly. It's been
7 discussed in conversations or emails between counsel. I agree
8 with you. If they don't have it they can't produce what
9 doesn't exist. I get that. But what -- I guess what I'm
10 missing is a representation that there is nothing else. I
11 keep asking do you have anything else or is this it, are we
12 done, and I can't seem to get that finality so I can know that
13 there's nothing else.

14 THE COURT: You're worried there's a rolling
15 production? We have to distinguish between documents they may
16 have gotten from you in discovery which they are not obligated
17 to produce back to you in documents that they have custody and
18 control of independent of this litigation.

19 So with respect to that, I don't know that we need a
20 representation other than the other party comes in and says
21 here are all the documents, I don't have anything else. I
22 assume when you produced documents, Mr. Mr. Oppenheim, that's
23 your position, you're not holding anything back. Is that
24 right?

25 MR. OPPENHEIM: We're not holding anything back.

1 Your Honor, may I just -- it's hard to sit quietly.
2 I'm doing my best but when defendant says you can't file a
3 copyright case without having --

4 THE COURT: Mr. Oppenheim, Mr. Oppenheim, Mr.
5 Oppenheim, I cut them off on that argument and I'm going to
6 have to cut you off on responding to it.

7 MR. OPPENHEIM: Okay.

8 THE COURT: Because it's not the law.

9 MR. OPPENHEIM: Okay. So anyways, no, we're not
10 withholding documents, Your Honor, and we've in fact produced
11 documents that she claims we haven't produced. I don't know
12 whether she hasn't reviewed the production or she doesn't
13 understand the --

14 THE COURT: It's enough, Mr. Oppenheim. It's enough
15 for you to say there isn't a rolling production with respect
16 to these matters. What you have so far -- anything you know
17 about that you have so far you have produced?

18 MR. OPPENHEIM: Yes.

19 THE COURT: Okay. I think that takes care of that
20 set of letters. Now we're at the depositions which I don't
21 know that we're going to be able to accomplish but we might be
22 able to narrow it.

23 Actually I wanted to start, Ms. Miller, with a
24 question to you.

25 MS. MILLER: Yes, Your Honor.

1 THE COURT: It related to a statement you made -- and
2 I'll read it to you. It's your letter, Page 4. You say you
3 find it "Unfair that the court ordered after plaintiffs
4 insisted that defendants overseas representative Tom Cahill
5 was required to travel from Australia and appear in person in
6 the United States for his deposition while none of plaintiffs
7 overseas representatives are being put to the same burden."
8 Can you tell me where I ordered that?

9 MS. MILLER: I don't think that you ordered it. I
10 think Judge Pauley ordered it.

11 THE COURT: Mr. Oppenheim, did Judge Pauley order
12 that?

13 MR. OPPENHEIM: No, no. Judge Pauley issued no such
14 order. I assume she's referring to the Mr. Cahill issue.

15 THE COURT: Which I dealt with in December.

16 MR. OPPENHEIM: Yes.

17 THE COURT: That was me. I have the transcript in
18 front of me.

19 MS. MILLER: Oh, yes.

20 THE COURT: Tell me where I did it. First of all,
21 Mr. Oppenheim, it's your understanding that's what I ordered?

22 MR. OPPENHEIM: I'm sorry, Your Honor. I'm trying to
23 catch up and pull out that sentence in our letter. Let me get
24 it quickly here.

25 MS. MILLER: I think Your Honor is right. I think

1 you did at some point say Mr. Cahill will come here. I know
2 it's the last hearing it was clarified. I asked you if it
3 could be done in Columbus and you said no, it will be done in
4 New York.

5 THE COURT: I want the line because I don't think I
6 ever ordered that.

7 MR. OPPENHEIM: No. In fact, what happened, Your
8 Honor, is that Mr. O'Grady and I discussed the issue and the
9 issue of cost and the burden of a video deposition and Mr.
10 O'Grady --

11 THE COURT: Right. I proposed a video deposition so
12 as not to inconvenience Mr. Cahill. So I want to know why Ms.
13 Miller is saying that I was being unfair by ordering something
14 that I don't think I ordered. If I'm wrong I'd like to know
15 the page of the deposition -- I'm sorry, of the transcript
16 where I did it.

17 MS. MILLER: Maybe I am mistaken. Mr. Oppenheim had
18 taken the position with us that we were obligated to bring him
19 here and then it became a question of trying to get him to pay
20 half the costs. We didn't want to bring him here. There
21 were --

22 THE COURT: You're not answering my question, Ms.
23 Miller. Ms. Miller, you made a statement about something I
24 did.

25 MS. MILLER: [Inaudible]

1 THE COURT: Ms. Miller, you have to not interrupt me.
2 You made a statement about something I ordered. If in fact
3 it's incorrect that's fine, just tell me. If it's correct,
4 tell me that. If you don't know, tell me that.

5 MS. MILLER: I don't have a citation so I don't know.

6 THE COURT: I don't think I ever ordered that. So if
7 that has affected your perception of my fairness or unfairness
8 I think you might want to think about that.

9 Let's go to the deposition issue.

10 MR. OPPENHEIM: Yes, Your Honor. I think the
11 first -- I think the best way to break this down is into
12 groups. The first group is the CEO's group.

13 THE COURT: Yes, it seemed like there was an
14 agreement with a caveat from Ms. Miller and I think I --

15 MR. OPPENHEIM: Your Honor --

16 THE COURT: Sorry.

17 MR. OPPENHEIM: Sorry. Go ahead.

18 THE COURT: It was that there was an -- and I think
19 the wording was a little broader than I think would be
20 required or should be required but we can talk about that but
21 since you haven't had a chance to respond, Mr. Oppenheim, go
22 ahead.

23 MR. OPPENHEIM: We'll stipulate, Your Honor, that we
24 have no intent on calling the CEOs but if for some reason that
25 would change before trial we would absolutely provide the

1 defendants with an opportunity to take their deposition.
2 We've already said in a letter to the court that they have no
3 percipient knowledge of the facts of this case and we don't
4 have an intent on calling them.

5 If for some reason our representation to the court
6 isn't enough and the defendant requires us to get that
7 representation directly from the CEOs, I suppose we can do
8 that. But I don't think we should have to have counsel
9 provide anything beyond that.

10 THE COURT: Well, is there a problem doing the
11 affidavit or not?

12 MR. OPPENHEIM: I mean --

13 THE COURT: I mean I think the issue should be
14 whether they have information other than information they
15 obtained as a result of this -- the filing of this -- from
16 lawyers as a result of filing this lawsuit and so forth.

17 MR. OPPENHEIM: Meaning, had they been briefed on the
18 lawsuit [inaudible] twice.

19 THE COURT: I don't think that should be --

20 MR. OPPENHEIM: But that's not knowledge.

21 THE COURT: Right. So an affidavit of that kind I
22 would have required if there had been motions. So it seems
23 fair to ask for that.

24 And then on the other point it seems to me you
25 should be able to say just as you said, and you can say it in

1 a letter, a written form that you have no intention at this
2 time to call in for any purpose and if something arises that
3 you don't foresee at this time that leads you to believe they
4 have relevant information you would immediately inform the
5 other side.

6 MR. OPPENHEIM: Absolutely, Your Honor.

7 THE COURT: Is that going to be enough, Ms. Miller?

8 MR. OPPENHEIM: I agree.

9 MS. MILLER: So we'd be allowed a deposition if
10 they'd be intended to be a witness of any kind.

11 THE COURT: I can't imagine not allowing you a
12 deposition if they suddenly announce that these people had
13 information and it's -- I can't fathom it right now.

14 MS. MILLER: Okay. I'm sure Your Honor understands
15 we're just trying to --

16 THE COURT: A very reasonable request, Ms. Miller. A
17 very reasonable request.

18 I think on the issue of the 30(b)(6) depositions the
19 letters were unfortunately very unclear to me and it seemed to
20 be disputes. I don't know that we can deal with them right
21 now since I have a conference in ten minutes. But I'm trying
22 to understand -- it's of some importance to me what happened
23 before and whether there was truly a 30(b)(6) deposition of
24 the corporations before on topics that defendants decided and
25 if that happened and there are now new topics I think I need a

1 good understanding of what happened that made them unable to
2 ask those questions originally because there really shouldn't
3 be multiple 30(b)(6)s of a corporation. I'm not saying it's
4 impossible but in an orderly world we would do a single notice
5 with all of our topics. They would prepare their people and
6 they wouldn't have to go back and do that again.

7 So I don't have a good understanding of how we got
8 in this situation. There seems to be a disagreement as to
9 whether there have been 30(b)(6) depositions at all. So I
10 think I'm going to need a little more detail on that. If
11 there's something else you think I can deal with in the next
12 five or ten minutes I'm happy to try.

13 MS. MILLER: A question about when you -- I know you
14 added on an attorney's eyes only layer to protectiveness. Do
15 we just want to leave that verbal from the hearing or did you
16 want us to revise the protective order to reflect that?

17 THE COURT: Whatever makes you more comfortable. I
18 would think that you might want something in writing that sets
19 it out and maybe there's something people sign. I leave that
20 completely up to you. If you feel you need it, Ms. Miller,
21 then you should draft it and give it to the other side and I
22 will sign it as quickly as I get it.

23 MR. OPPENHEIM: Your Honor, with -- I'm sorry. Are
24 we done with that topic? I don't want to cut it off.

25 THE COURT: I think so.

1 MR. OPPENHEIM: With respect to the 30(b)(6) issue, I
2 agree entirely with what Your Honor said. We want to know the
3 totality of what it is we're going to be required to produce
4 witnesses on before we start producing witnesses again because
5 I don't want to have to have witnesses who have testified be
6 re-examined yet again. So I know that the defendant has asked
7 to take the depositions of Mr. Garry and Mr. Sampson which
8 we've agreed to allow them to do and I'm prepared to make them
9 available as well as Mr. Lavoka [Ph.] but I don't want to do
10 that until we've resolved what the -- what if any 30(b)(6)
11 topics we may have to provide witnesses on because we would
12 very well might just designate those witnesses to testify on
13 them.

14 Now, from our perspective with respect to the ten
15 30(b)(6) topics that were raised in the February -- the
16 February 10th letter we believe most of them -- they've already
17 examined Mr. Essig on -- at length. In fact, most of these
18 came up at the December hearing with Your Honor. So we're
19 kind of trotting ground we've been over again. But to the
20 extent that it would assist Your Honor in resolving this what
21 we could do is with respect to each of those ten topics give
22 you excerpts from the other depositions showing that they've
23 already asked questions on these as well as giving you the
24 prior 30(b)(6) notices where we said we were going to provide
25 witnesses on those topics and which I think Your Honor already

1 has as an exhibit to Exhibit 4 to our letter as well as the
2 other exhibits to the letter which already lay out that we
3 provided -- that they noticed up the depositions of
4 representatives of the company which -- who all testified
5 already.

6 But if Your Honor wants excerpts on each of these
7 topics from the depositions we can do that. I don't know --

8 THE COURT: I don't think I meant to be saying that.

9 MR. OPPENHEIM: Okay.

10 THE COURT: What -- this is my vision of what
11 happened is that there were some people from these companies
12 examined. In the plaintiff's view you think they were
13 pursuant to a 30(b)(6) notice that you objected to and said
14 here's what we'll prepare them on. Is that right? Is that
15 your view, Mr. Oppenheim?

16 MR. OPPENHEIM: Well, they did two things previously.
17 One is they issued a 30(b) -- a general -- a 30(b)(6) notice
18 with respect to four topics and we objected to those topics
19 but then we'd make witnesses available to a narrower aspect of
20 those topics because the topics were quite broad.

21 THE COURT: Which you set out in the --

22 MR. OPPENHEIM: Then they noticed -- which we set out
23 in -- it's Exhibit 4 to the letter we sent you, Your Honor.

24 THE COURT: Okay.

25 MR. OPPENHEIM: And then they also noticed, and

1 these are Exhibits I think 1, 2 and 3 of our letter if I've
2 got this right, they noticed up a deposition of Pearson
3 Education and they asked to depose Pearson Education attention
4 Richard Essig. And we produced Mr. Essig in --

5 THE COURT: Your view that was a 30(b)(6) deposition?

6 MR. OPPENHEIM: Well, and they in fact asked
7 questions on all of the topics that they list -- almost,
8 virtually all of the topics that they're listing now. So they
9 really are seeking -- Mr. Essig would be the witness on many
10 of these things so they really --

11 THE COURT: Maybe this is the issue and maybe -- you
12 can tell me, Ms. Miller. It sounded like part of your
13 complaint, Ms. Miller, was that there were I don't know given
14 to some topics but that may be the answer, the 30(b)(6) answer
15 on that topic which is that the corporation doesn't have
16 information on those particular questions and you just need an
17 assurance that that's in fact their final answer. So that
18 part of what's going on here? I can't really tell.

19 MS. MILLER: Absolutely correct. If they want to
20 stipulate that Pearson's evidence or testimony will not be
21 beyond what Mr. Essig will say or has said that's fine.

22 THE COURT: So maybe the way to deal with this is
23 for -- I mean I might be able to narrow some topic areas. I'm
24 not sure but for you to say please confirm that the answers
25 given to -- by Mr. So and So at this deposition represent the

1 corporation's knowledge with respect to the following
2 questions I asked at the deposition and then you would
3 identify them by page or page range or something like that.
4 Do you think that could solve a lot of this?

5 MS. MILLER: I think that would solve a lot of this.
6 I think it may leave open some debate about things that
7 weren't talked about at all at the deposition.

8 THE COURT: So now we're at the areas that you did --
9 that your predecessor didn't ask about and you feel you would
10 like the opportunity to ask about; right?

11 MS. MILLER: Right.

12 THE COURT: So as to those topic areas that's what I
13 think I need the letters on, for you to say here's what we
14 didn't ask about, here's why we didn't ask about them and
15 here's -- and we think we're entitled and he's going to
16 answer -- Mr. Oppenheim will answer either by saying those are
17 not relevant or you shouldn't get a second bite at the apple
18 or both. I think maybe if we can try to narrow it to my
19 getting letters on that it will be a big help. Do you think
20 that might work, Ms. Miller?

21 MS. MILLER: The letters on [inaudible - breaking up
22 on telephone] ask about and why.

23 MR. OPPENHEIM: Though, Your Honor, I assume that
24 even once you receive those letters you'll still consider the
25 case law that says that they can't -- they can't seek to take

1 30(b)(6)s again.

2 THE COURT: No, I'll consider that and I think what I
3 said is it's not absolute. I said normally one should do it
4 all at once and not come back and do it again but I said I
5 could imagine situations where that wasn't true. For example,
6 you might learn something in discovery that opened up a topic
7 area that you had no reason to know was at issue in the case.
8 There's all kinds of reasons why you might validly -- not all
9 kinds but there are some reasons why you might validly need a
10 second 30(b)(6) deposition.

11 Also, Ms. Miller may have some argument that in fact
12 those weren't 30(b)(6) depositions and I don't want to
13 foreclose her from arguing that. I have no idea. But that I
14 think is the framework under which we should be operating.

15 MR. OPPENHEIM: We'll respond to Ms. Miller's letter
16 and see if we can narrow --

17 THE COURT: I think, Ms. Miller, you should try to do
18 what I said which is to say on these questions please confirm
19 this is the position of the corporation and then whatever is
20 left you'll -- it will be brought to me by letter.

21 MS. MILLER: One other quick question, Your Honor. I
22 know you've got to go but are we still okay with the current
23 case schedule? We're still on board with that?

24 THE COURT: I don't know but if the parties have a
25 problem with it there's a very specific method in my rules for

1 getting an extension. So I'd like you to follow that --

2 MR. OPPENHEIM: Your Honor, at the -- I'm sorry, I
3 didn't mean to --

4 THE COURT: Go ahead. Go ahead.

5 MR. OPPENHEIM: At the last conference -- the current
6 discovery schedule is set to close on February 28th and at the
7 end of the last conference I raised with Your Honor that it
8 seemed unlikely that we would be quite done by February 28th
9 given the outstanding issues and Your Honor's response was of
10 course that's not a problem, we can deal with that. Or
11 something to that effect and I don't know offhand whether we
12 were still on the record at that point. I think we probably
13 weren't --

14 THE COURT: I'm sure we were and it sounds like
15 something I would say. So go ahead.

16 MR. OPPENHEIM: So I think we're close, Your Honor,
17 but I know for instance that --

18 THE COURT: You're close on what?

19 MR. OPPENHEIM: Well, I think we're getting close to
20 concluding discovery but there's --

21 THE COURT: I actually don't want to have this
22 conversation. I would like you to use my process which is for
23 the two of you to discuss whether you are mutually agreeing to
24 an extension and if you're not to write competing letters on
25 the topic.

1 MR. OPPENHEIM: Very well, Your Honor.

2 THE COURT: Ms. Miller, anything we can do in the
3 last two minutes?

4 MS. MILLER: Nothing further, Your Honor. Thank you.

5 THE COURT: Mr. Oppenheim, anything?

6 MR. OPPENHEIM: No. Thank you, Your Honor.

7 THE COURT: Thank you everyone.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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Shari Riemer

7 Dated: February 22, 2014
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